

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 30152

STATE OF IDAHO,)	
)	2007 Opinion No. 67
Plaintiff-Respondent,)	
)	Filed: October 1, 2007
v.)	
)	Stephen W. Kenyon, Clerk
DAVID JOSEPH MEISTER,)	
)	
Defendant-Appellant.)	
)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Latah County. Hon. John R. Stegner, District Judge.

Judgment of conviction and fixed life sentence for first degree murder and concurrent unified life term, with a minimum period of confinement of forty years, for conspiracy to commit first degree murder, affirmed in part; vacated in part, and remanded; order denying motion for a new trial, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant. Erik R. Lehtinen argued.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cude, Deputy Attorney General, Boise, for respondent. Rebekah A. Cude argued.

PERRY, Chief Judge

David Joseph Meister appeals from his judgment of conviction and sentences for first degree murder and conspiracy to commit first degree murder. Additionally, Meister appeals from the district court's order denying his motion for a new trial. For the reasons set forth below, we affirm in part, vacate in part, and remand for further proceedings.

I.

FACTS AND PROCEDURE

In the late evening of December 11, 2001, a man heard two loud noises outside his residence. The man went out to investigate the noises and found his female neighbor, Tonya Hart, shot to death on the floor of her home. The man called the police.

The police arrived at the home and determined that Hart had been shot twice, once in the head and once in the chest. The police found two spent shell casings and recovered one bullet lodged in the wall. The police also located footprints in the snow leading from the back of the victim's home, over a hill and some fences. The footprints eventually terminated at a nearby road.

An autopsy was performed on Hart, and the second bullet was found lodged near her spine. The police learned that the bullets and casings were from a nine-millimeter pistol. The police identified the brand of shoes worn by the individual who left the footprints in the snow. They also found a briefcase near the same road to which the footprints led. The briefcase, which contained residue of marijuana, had been stolen from an unrelated individual shortly before the murder. Early in the murder investigation, police considered the man who had stolen the briefcase, Lane Thomas, to be a primary suspect. Thomas admitted to the police that he was driving near the scene of the crime at approximately the same time the murder took place. The police conducted follow-up interviews with Thomas as well. However, another man later informed the police that he had sold a nine-millimeter gun and a box of remanufactured ammunition to Meister a few weeks prior to the murder, and police attention then turned toward Meister as a potential suspect in the murder.

On August 29, 2002, at a detective's request, Meister went to the police station for an interview. Meister eventually confessed to murdering Hart as part of a murder-for-hire conspiracy with Hart's boyfriend, Jesse Linderman. Although the interview took over four hours, Meister was given several breaks to walk outside and smoke. Meister's final repetition of his confession was the only part of the interview that was recorded.

In his confession, Meister explained that Linderman offered him \$1000 to kill Hart and had given Meister \$500 in advance. Meister further explained that, after some period of time, Linderman promised to give him a \$100 bonus if he killed Hart before Christmas. Meister admitted to going to Hart's home, attempting to open the front door, and when he could not, circling around to the back door, which he knocked on. Meister described shooting Hart with the handgun, twice, when she opened the back door. After the shooting, Meister stated that he fled over the hill near Hart's home and then to his home. Meister also described how he disposed of the weapon and some of his clothes as he returned to his home that night. Meister was arrested

and charged with murder in the first degree, I.C. §§ 18-4001, 18-4003, and conspiracy to commit murder in the first degree, I.C. § 18-1701.

Meister filed three motions to suppress his confession. In those motions, Meister argued that his confession should have been suppressed because the police did not give him an adequate *Miranda*¹ warning, the police coerced him into giving the confession, and the police chose to record only part of the interview. After holding a hearing, the district court denied the motions, holding that Meister was given an adequate *Miranda* warning, that his confession was freely and voluntarily given, and that the failure to record the full interrogation was not a due process violation.

Meister also filed a motion in limine seeking an order that two documents regarding the alleged conspiracy between himself and the victim's boyfriend would be admissible at trial. The state filed a motion in limine to preclude the defense from introducing alternate perpetrator evidence. The district court held a hearing and ruled that the documents proffered by Meister and any alternate perpetrator evidence were inadmissible.

During the trial, Meister renewed his request to present alternate perpetrator evidence, but the district court denied the request. A jury found Meister guilty of both charges. The district court sentenced Meister to a fixed term of life for first degree murder and a concurrent unified term of life, with a minimum period of confinement of forty years, for the conspiracy. Meister appealed. During the pendency of this appeal, Meister filed a motion for a new trial on the basis of newly-discovered evidence. The district court denied that motion.

Meister now appeals from his judgment of conviction and from the district court's order denying his motion for a new trial. On appeal, Meister contends that the district court made numerous errors. Meister argues that the district court erred when it admitted evidence of his confession and when it excluded certain documents in which the prosecutor admitted that he did not have sufficient evidence to convict Meister's alleged co-conspirator of conspiracy to commit first degree murder. Additionally, Meister asserts that the district court erred in excluding his proffered alternate perpetrator evidence. Meister also asserts the district court erred in denying

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

his motion for new trial. Finally, Meister asserts his sentences are excessive and were imposed in violation of his constitutional rights.

II. ANALYSIS

A. Evidence of Confession

Meister argues that the district court erred in admitting evidence of his confession, which was obtained after a lengthy, untaped interview. Specifically, Meister asserts that the state's failure to record his interview with the police was a violation of his due process rights because it left him without the evidentiary means to challenge the techniques used by the police during the interview.²

Where a defendant claims that his or her right to due process was violated, we defer to the trial court's findings of fact, if supported by substantial evidence. *State v. Smith*, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001). However, we freely review the application of constitutional principles to those facts found. *Id.*

The current state of the law, as conceded by Meister, can be found in *State v. Rhoades*, 121 Idaho 63, 822 P.2d 960 (1991), where the Idaho Supreme Court held that statements made in custody need not be tape-recorded in order to be admissible. *Rhoades*, 121 Idaho at 73, 822 P.2d at 970. We acknowledge that other states take a different approach and mandate recording of custodial interrogations to protect a defendant's due process rights. *See, e.g., Stephan v. State*, 711 P.2d 1156 (Alaska 1985);³ *State v. Scales*, 518 N.W.2d 587 (Minn. 1994). However, although we may agree with the policies asserted by Meister, we are constrained to follow this state's precedent.⁴ We cannot, therefore, conclude that the district court erred in denying

² Meister asserted three bases for the suppression of his confession in the district court. However, on appeal, Meister only challenges the district court's denial of his request for suppression based on the failure to record the entire interview.

³ In its *Rhoades* decision, the Idaho Supreme Court considered and rejected the holding in *Stephan*. *Rhoades*, 121 Idaho at 73, 822 P.2d at 970.

⁴ Nevertheless, this Court has stated that a "trial court most certainly may consider the absence of a recording, when the interrogating officer conveniently could have made one, in evaluating the officer's credibility." *State v. Doe*, 130 Idaho 811, 815, 948 P.2d 166, 170 (Ct. App. 1997).

Meister's motion to suppress his confession and in allowing evidence of the confession to be presented at trial.

B. Exclusion of Documents

Meister argues that the district court erred in excluding evidence of the prosecutor's admission that the state did not have sufficient evidence to convict Linderman of conspiring with Meister to commit the murder. Meister sought to introduce into evidence two documents related to his alleged co-conspirator. The first was a complaint filed against Linderman alleging that he was guilty of conspiracy to commit murder in the first degree. The second document was the state's motion to dismiss the complaint which indicated that, because Meister could not be compelled to testify for the state, the state could not meet its burden of proof. After a hearing on the motion, the district court denied Meister's request, holding that the evidence was irrelevant under I.R.E. 401 or, in the alternative, inadmissible under I.R.E. 403 because its probative value was outweighed by the risk of confusing the jury.

We review questions of relevance de novo. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993). Under I.R.E. 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." On appeal, Meister argues that any evidence tending to disprove the conspiracy would necessarily exculpate both Meister and Linderman. Meister contends the fact that the state dismissed the conspiracy charges against Linderman would be relevant to the issue of whether the state could prove any such conspiracy existed.

Initially, we note that the state did not seek to dismiss the conspiracy charges against Linderman because it had in its possession evidence tending to disprove that he was involved in a conspiracy. Instead, the state concluded that, without Meister's testimony against Linderman, it would not be able to meet its burden of proof in that case. Therefore, the evidence Meister sought to admit at trial through the proffered documents was not evidence tending to exculpate him from the conspiracy charge. Rather, the documents only demonstrated that the same evidence the state sought to use against Meister--his own admissions--could not be used against Linderman absent Meister's cooperation. This is so because in a trial of Linderman, use of Meister's out-of-court confession would violate Linderman's right to confront and cross-examine witnesses under the Sixth Amendment to the United States Constitution. The state could not

compel Meister to testify in person against Linderman, of course, because Meister did not waive his privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

In short, evidence that had any tendency to show that Meister was part of a conspiracy to murder Hart was relevant to the prosecutor's case against Meister at trial. The substantive evidence demonstrating Meister was part of the conspiracy was his own admission and is clearly relevant. However, the documents acknowledging that this same substantive evidence could not be used against Linderman, for legal reasons, is not a fact of consequence in making the determination that Meister was or was not involved in the conspiracy and is therefore not relevant. Accordingly, the district court did not err in concluding the documents charging Linderman with conspiracy, and then dismissing those charges, were inadmissible because they were irrelevant to Meister's case.

C. Alternate Perpetrator Evidence

Meister asserts that the district court erred in excluding evidence of an alternate perpetrator as inadmissible. Prior to trial, the state filed a motion in limine seeking, among other things, to exclude any evidence incriminating Thomas or otherwise suggesting that he killed the victim. Without providing an offer of proof, Meister indicated that he intended to introduce testimony, from Thomas and others, which would implicate Thomas in the murder. The district court granted the state's motion on the basis that Meister failed to submit substantial corroborating evidence supporting an alternate perpetrator theory. In reaching its decision the district court relied upon the authority of *State v. Larsen*, 91 Idaho 42, 415 P.2d 685 (1966).

During his trial, Meister again sought to introduce evidence that allegedly linked Thomas to the murder and filed an offer of proof in support of his motion. Meister's offer of proof included evidence that Thomas had a violent, adversarial relationship with the victim and her boyfriend, had intimate familiarity with the location where the crime was committed, and had a lengthy criminal record. Meister sought to introduce testimony from two witnesses who had seen a man fitting the general description of Thomas near the location of the victim's home on the night of the crime. Meister sought to introduce Thomas's voluntary statement to the police two days after the murder, which put him near the scene of the crime about the time of the murder.

Meister also attempted to introduce alleged statements wherein Thomas had, several months after the victim's murder, divulged potentially incriminating details of the crime to two fellow inmates in jail. One of the inmates said Thomas indicated he was present at the time of the murder but did not actually kill the victim himself. The second inmate said that Thomas frequently spoke about the murder and initially seemed upset about being under suspicion, but, by June 2002, Thomas seemed to be bragging about the murder and said "They'll never catch me." This inmate also indicated that Thomas said he had gone to the residence of Hart and Linderman on the night of the murder to steal marijuana from them because they had ripped him off in the past. The offer of proof also included evidence that Thomas admitted to the police, several months after his alleged jailhouse statements, that he was involved in an unrelated drug crime the evening of the murder--the theft of the briefcase found near the scene of the crime and the marijuana within it. Additionally, the offer of proof set forth further statements made by the husband of Thomas's sister alleging that Thomas had arrived at their house late the night of the murder and that the husband later found his wife, Thomas's sister, inexplicably "wiggling out and crying." The husband also said that his wife suspected Thomas was lying about his lack of involvement in the crime. Thomas's sister further allegedly stated that Thomas's wife warned the sister and her husband not to talk to the police or "they would be next." Finally, the offer of proof suggested testimony would be presented establishing that Thomas's brother burned clothing at a neighbor's home a few days after the murder. The district court denied admission of any alternate perpetrator evidence, apparently relying again on *Larsen*.

After his judgment of conviction and sentencing, Meister filed a motion for a new trial, which was based, in part, on evidence of newly-discovered evidence supporting Meister's alternate perpetrator theory. Meister submitted a statement made to the police by L.R., a female acquaintance of Thomas. L.R. reported to the police that, during a phone conversation with Thomas, when she had asked him to pay back money he had borrowed from her, he became angry. Shortly thereafter, Thomas came to L.R.'s home and angrily threatened to burn down her house. Thomas then informed L.R. that he had killed a woman before, and that it would not be that hard to do it again. He said that "someone else" was incarcerated for the murder he had committed. Thomas also threatened L.R. by stating she was one of the top three women he would rape. The new evidence was only in the form of the police report and did not include an affidavit from L.R. The district court concluded, in part, that Thomas's out-of-court statements

to L.R. would be inadmissible hearsay that could not be admitted as statements against Thomas's penal interest under Idaho Rule Evidence 804(b)(3) because the statements lacked corroborating circumstances that clearly indicated their trustworthiness.⁵ In so ruling, the district court appears to have relied on its prior rulings that Meister's alternate perpetrator evidence was inadmissible pursuant to *Larsen*.

In *Larsen*, the defendant was charged with murdering a woman. At trial, Larsen offered evidence that a man named Butler, who had initially been a suspect early in the police investigation, was the actual murderer. The district court refused to admit this alternate perpetrator evidence implicating Butler. On appeal, the Idaho Supreme Court addressed the alternate perpetrator evidence under the common law rules of evidence. The Court divided the alternate perpetrator evidence offered by Larsen into two separate categories--the testimony of three witnesses on the alternate perpetrator's out-of-court confession to committing the murder and all other evidence implicating the alternate perpetrator.

The Idaho Supreme Court first addressed evidence other than the alternate perpetrator's out-of-court confession. That evidence included evidence that human blood stains had been discovered on the back seat of Butler's vehicle and on a spare tire in the trunk; that the trunk of Butler's vehicle had been thoroughly washed and cleaned when the body and interior of the vehicle had not; that plant particles matching the plants growing at the victim's gravesite were found on Butler's vehicle; that Butler was not at work the day the murder was suspected to have taken place and when he returned to work he had deep scratches on his face; and that Butler had a previous sexual relationship with the deceased and had lived with her. Larsen also proffered testimony that would establish that the deceased had told a schoolmate that she was pregnant with the child of a married man, but the schoolmate could not remember the married man's name, and no evidence was offered to show that Butler was married. The deceased had also told the same schoolmate that she knew someone was going to kill her, but no offer was made as to whether the deceased had revealed the name of this person. In reviewing the admissibility of this evidence, the Idaho Supreme Court set forth the "direct connection" doctrine, holding that in order for evidence of an alternate perpetrator to be admissible there must be proof of a train of facts or circumstances that tend to clearly point out someone besides the accused as the guilty

⁵ The district court also concluded that the new evidence of Thomas's statements to L.R. would not produce an acquittal. The merits of that ruling are addressed later in this opinion.

party. *Larsen*, 91 Idaho at 47, 415 P.2d at 690. The Supreme Court concluded that Larsen's offer of proof did not create a "train of facts or circumstances" which clearly pointed to another perpetrator and, instead, made nothing more than "conjectural inferences." *Id.* at 48-49, 415 P.2d at 691-92. The Supreme Court held that this evidence was inadmissible as it did not sufficiently demonstrate that someone other than the defendant committed the crime. *Id.*

The Supreme Court next addressed Larsen's proffered testimony on Butler's alleged out-of-court confessions to having committed the murder. Larsen proffered testimony of three disinterested witnesses that Butler, in their presence, admitted killing the deceased and that he related details concerning the crime. On appeal, the Court noted that the majority of jurisdictions, at that time, excluded confessions of third parties, made out of court, that tended to exonerate the accused because such confessions are hearsay admissions against a penal interest rather than a pecuniary or proprietary interest. The Court reasoned, however, that it is at least as probable that admissions which may subject oneself to criminal liability are as trustworthy as those which may subject oneself to financial liability. The Court then cautioned that admitting bare, out-of-court confessions might open the door to defendants to produce perjured and fraudulent "confessions" by others who, for some unexplained reason, have "disappeared" or are otherwise "unavailable" as witnesses. After looking to tests set forth in other jurisdictions that had admitted hearsay evidence of third-party confessions, the Court held that such confessions "are admissible only when there is other substantial evidence which tends to show clearly that the declarant is in fact the person guilty of the crime for which the accused is on trial." *Larsen*, 91 Idaho at 49, 415 P.2d at 692. Therefore, although the Court addressed the hearsay evidence of the alternate perpetrator's confessions separately, the Court held that such hearsay evidence was admissible only if it passed the same direct connection requirement that applied to the other alternate perpetrator evidence. The Court then held that Larsen failed to satisfy the test, and Butler's confession was inadmissible. *Id.*

Years after the *Larsen* decision, the Supreme Court adopted the Idaho Rules of Evidence which now govern the evidence that a party is entitled to present at his or her trial. We must now address the district court's reliance on *Larsen* to exclude Meister's proffered alternate perpetrator evidence in light of the Idaho Rules of Evidence.

1. Idaho Rule of Evidence 403

This Court addressed the *Larsen* direct connection doctrine in light of I.R.E. 403 in *State v. Kerchusky*, 138 Idaho 671, 67 P.3d 1283 (Ct. App. 2003). There, Kerchusky proffered circumstantial evidence that either of two other individuals might have committed the crime he was charged with. The district court excluded the evidence based on the direct connection doctrine expressed in *Larsen*. On appeal, this Court initially noted that a commentator had referred to the direct connection doctrine applied in *Larsen* as a specialized application of the requirement, now embodied in I.R.E. 403, that a trial court balance the probative value of evidence against countervailing considerations. *Kerchusky*, 138 Idaho at 674, 67 P.3d at 1286. Idaho Rule of Evidence 403 authorizes the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” This Court then endorsed the view of the California Supreme Court expressed in *People v. Hall*, 718 P.2d 99, 104 (Cal. 1986), that courts should treat third-party culpability evidence like any other evidence. *Kerchusky*, 138 Idaho at 675, 67 P.3d at 1287. We therefore concluded that our review of the district court’s exclusion of the alternate perpetrator evidence in that case should be an inquiry as to whether the court correctly applied I.R.E. 403. *Id.* at 675, 67 P.3d at 1287.

We implicitly held in *Kerchusky*, and we now expressly hold, that the adoption of I.R.E. 403 by the Idaho Supreme Court superseded the direct connection doctrine expressed in *Larsen* to the extent that the doctrine established any distinct and elevated standard for admitting alternate perpetrator evidence. Under the Idaho Rules of Evidence, a court is not authorized to classify evidence as being unique because it supports an alternate perpetrator theory and, so long as it is relevant and is not excluded by any other evidentiary rules, its admissibility is governed by I.R.E. 403. Therefore, the task of deciding the admissibility of evidence supporting an alternate perpetrator theory is a matter left to the trial court’s discretion and is to be determined under the criteria of I.R.E. 403 and any other applicable Idaho Rules of Evidence, not by the standards applied in *Larsen*.

To be sure, the concerns expressed in *Larsen* specific to the issue of alternate perpetrator evidence may be taken into consideration by a trial court when making its I.R.E. 403 analysis. *See Larsen*, 91 Idaho at 47, 415 P.2d at 690. Specifically, evidence suggesting only a tenuous or

remote connection to another individual or simply conjecturing that the crime could have been committed by someone other than the accused, may not meet the relevancy threshold and, even if marginally relevant, perhaps should not be admitted under the I.R.E. 403 criteria. *See Larsen*, 91 Idaho at 47, 415 P.2d at 690; *see also Kerchusky*, 138 Idaho at 676, 67 P.3d at 1288. Nonetheless, the admission of evidence is generally an issue of discretion, and a lower court's determination under I.R.E. 403 will not be disturbed on appeal unless it is shown to be an abuse of that discretion. *State v. Enno*, 119 Idaho 392, 406, 807 P.2d 610, 624 (1991); *State v. Clark*, 115 Idaho 1056, 1059, 772 P.2d 263, 266 (Ct. App. 1989).

The district court here erred by concluding that the admissibility of any of the evidence tending to implicate Thomas was a matter governed by the general doctrine enunciated in *Larsen* rather than the Idaho Rules of Evidence. The district court's error does not necessarily require a new trial, however. A new trial would be warranted only if the district court's error deprived Meister of admissible evidence that would have aided his defense. Whether that occurred is a question which cannot be answered based on the record before us. First, as explained above, whether evidence should be excluded under Rule 403 is a discretionary decision committed in the first instance to the trial court. Therefore, remand is necessary for the district court to make the discretionary determination applying the correct legal standards. Second, most of Meister's offer of proof consisted of hearsay evidence--police reports and other documents representing what various witnesses were purported to have said to third parties. It remains to be seen whether Meister can actually produce witnesses who can present admissible testimony. Therefore, rather than vacating Meister's judgment of conviction, we will remand this matter for the trial court to determine if any of the alternate perpetrator evidence is admissible under the Idaho Rules of Evidence.

On remand, the district court must consider the relevant and otherwise admissible alternate perpetrator evidence under the criteria of I.R.E. 403 by balancing its probative value against the countervailing considerations outlined in the rule. In its review, the district court should consider whether the evidence under review sufficiently points to Thomas as the possible perpetrator or whether the offered evidence indicates such tenuous and remote connection that it cannot withstand the criteria of I.R.E. 403. Because Meister previously proffered much of the alternate perpetrator evidence in hearsay form, it may be advisable for the district court to conduct an evidentiary hearing at which Meister may be required to make his offer of proof

through the testimony or affidavits of the particular witnesses he seeks to present. This will ensure that if a new trial is granted, Meister will actually be able to produce the evidence he claims to possess.

2. Idaho Rule of Evidence 804(b)(3)

Some of the most significant alternate perpetrator evidence offered by Meister takes the form of out-of-court statements allegedly made by Thomas, which implicated Thomas in the murder and would thus exculpate Meister. That evidence included statements wherein Thomas divulged potentially incriminating details of the crime to two fellow inmates and threatening statements Thomas allegedly made to L.R. Assuming Thomas is unavailable because he will invoke his privilege against self-incrimination under the Fifth Amendment, and the witnesses to whom he allegedly made the statements will testify for the defense, those statements may be inadmissible hearsay under the Idaho Rules of Evidence. *See* I.R.E. 801(c), 802. In ruling on the admissibility of Thomas's statements to L.R., submitted in the form of police reports with Meister's motion for a new trial, the district court appears to have reasoned that the applicable hearsay exception, I.R.E. 804(b)(3), merely restates the direct connection doctrine set forth in *Larsen*. Because the district court will be required to determine the admissibility of Thomas's out-of-court statements again on remand, we must determine the proper standard for admitting hearsay evidence of a third party's out-of-court confessions.

When the declarant is unavailable to testify at trial, I.R.E. 804(b)(3) prohibits a court from excluding as hearsay:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject declarant to civil or criminal liability, or to render invalid a claim by declarant against another, that a reasonable man in declarant's position would not have made the statement unless declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Similar to the common law rule set forth in *Larsen*, this "statement against interest" hearsay exception is premised upon the idea that a person, even a person who is not very honest, is unlikely to make a false statement that tends to admit his or her own liability. *See Williamson v. United States*, 512 U.S. 594, 599 (1994). Additionally, the "corroboration" clause of I.R.E. 804(b)(3) requires that the party seeking to admit the statement to exculpate the accused in a

criminal case must establish the trustworthiness of the contents of the hearsay statement with sufficient corroborating evidence. *See State v. Preist*, 128 Idaho 6, 16-17, 909 P.2d 624, 634-35 (Ct. App. 1995).

Unlike the direct connection doctrine set forth in *Larsen*, however, I.R.E. 804(b)(3) merely requires the defendant to show that corroborating circumstances clearly indicate the trustworthiness of the statement. The corroboration clause in I.R.E. 804(b)(3) does not require a defendant to go so far as the direct connection doctrine by requiring the defendant to present substantial evidence which tends to show clearly that the alleged third-party confessor is in fact the person guilty of the crime. *See Larsen*, 91 Idaho at 49, 415 P.2d at 692. Because the direct connection doctrine sets forth a different standard from the corroboration clause of I.R.E. 804(b)(3), we hold that adoption of I.R.E. 804(b)(3) by the Idaho Supreme Court superseded the direct connection doctrine with respect to hearsay confessions of third parties. We therefore conclude that the district court erred to the extent that it reasoned that I.R.E. 804(b)(3) merely restates the direct connection doctrine.

Although it is clear that the direct connection doctrine is no longer the test, the extent of the evidence of trustworthiness required by I.R.E. 804(b)(3) has not yet been thoroughly addressed by Idaho appellate courts. In *Priest*, we concluded that, even though a hearsay statement correctly described the location of a corpse, that physical evidence had little corroborative value because, by the time the statement was made, the location of the victim would have been known by anyone with an interest in the case. *See Priest*, 128 Idaho at 17, 909 P.2d at 635. Presumably, had the statement been made prior to the location of the body becoming widely-available knowledge, the corroborative value of the physical evidence would have been greater.

The United States Supreme Court does not appear to have squarely addressed this issue in regard to Federal Rule of Evidence 804(b)(3), which is nearly identical to I.R.E. 804(b)(3). However, Justice Blackmun's dissent in *Lee v. Illinois*, 476 U.S. 530, 554-56 (1986), while not authoritative, is instructive. Justice Blackmun pointed out that hearsay statements made by one murderer were corroborated by the other murderer's confession to the crime and description of its circumstances. *Lee*, 476 U.S. at 554. Thus, corroborative evidence in the form of admissible statements made by other persons that confirm the hearsay statement could be sufficient to satisfy the I.R.E. 804(b)(3) requirement. Justice Blackmun's dissent also notes that physical

crime-scene evidence may sufficiently corroborate the hearsay statement in question. *See id.* at 554-56.

The Ninth Circuit Court of Appeals has discussed the factors to be considered in determining whether the corroboration requirement of F.R.E. 804(b)(3) has been met. In *United States v. Hoyos*, 573 F.2d 1111 (9th Cir. 1978), the Court initially noted that Congress meant to preclude reception of exculpatory hearsay statements against penal interest unless accompanied by circumstances solidly indicating trustworthiness, and this requirement goes beyond minimal corroboration. *Hoyos*, 573 F.2d at 1115. The Court went on to list the following factors as relevant to determining trustworthiness: (a) the time of the declaration and the party to whom it was made; (b) the existence of corroborating evidence; (c) the extent to which the declaration is really against the declarant's penal interest; and (d) the availability of the declarant as a witness. *Id.* The Ninth Circuit has indicated, however, that sufficient corroborative evidence need not completely prove that the offered statement is entirely trustworthy, only that the corroborating facts and circumstances are sufficient to admit the evidence. *See United States v. Paguio*, 114 F.3d 928, 933 (9th Cir. 1997) In *Paguio* the declarant, the defendant's father, had a motive to make false self-inculpatory statements--namely, to shift blame away from his son. Despite this motive, the evidence in the record was sufficient to corroborate the declarant's statements such that it met the admissibility requirements of F.R.E. 804(b)(3). Ultimately, the court concluded, it is the jury who must decide whether a declarant's statement is believable or not. *Id.*

The corroboration clause in Washington Rule of Evidence 804(b)(3) is similar to those in I.R.E. 804 and its federal counterpart. However, Washington courts assess the adequacy of corroborating circumstances by evaluating nine factors. *State v. Young*, 161 P.3d 967, 974 (Wash. 2007). These factors are as follows:

1. Was there an apparent motive for declarant to lie?
2. What was the declarant's general character?
3. Did more than one witness hear declarant's statement?
4. Was the statement made spontaneously?
5. Did the timing of the statements and the relationship between declarant and witness suggest trustworthiness?
6. Does the statement contain an express assertion of past facts?
7. Did the declarant have personal knowledge of the identity and role of the crime's other participants?
8. Was the declarant's statement based upon faulty recollection?

9. Was the statement made under circumstances that provide reason to believe the declarant misrepresented defendant's involvement in the crime?

State v. Roberts, 14 P.3d 713, 729 (Wash. 2002). This interpretation of the corroboration clause puts a premium on the trustworthiness of the declarant, rather than on evidence of objective facts that support the contents of the hearsay statement itself.

Arizona Rule of Evidence 804(b)(3) also has a corroboration requirement for statements against penal interest that is identical to I.R.E. 804(b)(3). See *State v. LaGrand*, 734 P.2d 563, 570 (Ariz. 1987). The Arizona Supreme Court held that, in determining if the corroboration requirement has been satisfied, the trial court "should be limited to asking whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true." *LaGrand*, 734 P.2d at 570. The Arizona court reasoned that questions of veracity, reliability, and credibility traditionally fall within the province of the jury, and a judge should not be able to bootstrap himself into the jury box via evidentiary rules. In *LaGrand*, one defendant, Walter LaGrand, offered as evidence statements made by his brother and co-defendant, Karl LaGrand, indicating that Karl had acted alone in stabbing two victims, one of whom died. Evidence corroborating Karl's statements included evidence that Karl had a bruise on his leg, as he stated, and the surviving victim testified that she saw the other victim kick someone. Additionally, the surviving victim testified that only one person stabbed her, and Walter testified that he was out of the room when the stabbings occurred. However, the evidence contradicting Karl's statements included testimony from the surviving victim that she saw the other victim struggling with two men; that she was positive that Walter had stabbed her; and that after she was stabbed by Walter and fell to the floor one brother said to the other twice, "Just make sure he's dead." Finally, the forensic consultant who performed an autopsy on the deceased victim testified that more than one instrument was used to inflict his wounds. The court concluded that a reasonable person could not conclude from the corroborating and contradictory evidence that the statements made by Karl could be true, and the trial judge properly denied admission of the statements. *LaGrand*, 734 P.2d at 571.

Regardless of which standard is used to determine if the circumstances clearly indicate the trustworthiness of a statement against penal interest, the corroboration requirement of I.R.E. 804(b)(3) must be balanced with the constitutional right to present a complete defense. In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the defendant initially confessed to killing a

police officer but later repudiated the confession. At trial, the court excluded, as hearsay, three witnesses' testimony that another person had admitted to shooting the officer. At that time, Mississippi did not recognize a hearsay exception for statements against penal interest. The United States Supreme Court reversed the judgment of conviction, stating:

The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 410 U.S. at 302. Similarly, in *Green v. Georgia*, 442 U.S. 95 (1979), the Court reversed a judgment of conviction where the state of Georgia had excluded hearsay statements because it did not recognize an against-penal-interest hearsay exception. *Green*, 442 U.S. at 97. More recently, in *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court reversed a judgment of conviction where the state prevented the defendant from presenting evidence supporting his theory that another man had committed the crimes, including testimony from witnesses who had heard the other man admit to committing the crimes. The Court held that South Carolina's rule excluding evidence about a third party's alleged guilt when the state presents strong forensic evidence of the defendant's guilt violated the defendant's right to have a meaningful opportunity to present a complete defense. *Holmes*, 547 U.S. at 331. In short, exculpatory hearsay statements cannot be excluded on purely mechanistic or arbitrary grounds as it would unduly interfere with the defendant's right to put on a defense. However, this right is not limitless. The Ninth Circuit held that the Arizona Supreme Court's ruling in *LaGrand* had not violated Walter LaGrand's right to present a complete defense by excluding the statements of his brother Karl. *LaGrand v. Stewart*, 133 F.3d 1253, 1267 (9th Cir. 1998). In so holding, the court noted that the *Chambers* doctrine does not stand for the proposition that a defendant must be allowed to put on any evidence he or she chooses. *LaGrand*, 133 F.3d at 1266.

We conclude that the district court in this case should use the standard set forth by the Arizona Supreme Court in *LaGrand*. The *LaGrand* test enables a trial court to exclude unsubstantiated or obviously fraudulent confessions, but does not exclude third-party confessions on purely mechanistic or arbitrary grounds. The test properly allows the jury to make determinations of veracity, reliability, and credibility when corroborating evidence reasonably

supports the out-of-court confession. We therefore hold that the corroboration requirement found in I.R.E. 804(b)(3) is satisfied if the trial court determines that the evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. The trial court's decision whether to admit or exclude such hearsay evidence is a discretionary decision, and a trial court's determination will be reversed only where there has been an abuse of that discretion. *See State v. Zimmerman*, 121 Idaho 971, 973-74, 829 P.2d 861, 863-64 (1992).

Accordingly, the district court should determine, in the first instance, whether any proffered hearsay confessions by Thomas satisfy the statements against penal interest exception consistent with this opinion. The district court on remand should consider whether other facts, adduced from existing and proffered physical or testimonial evidence, corroborate Thomas's statements to ensure his statements are not deliberate falsehoods resulting from, for example, a desire to appear tough and intimidating to his fellow inmates or L.R. We also note that some of Thomas's alleged statements indicated that the police were after Thomas but may not have necessarily implicated Thomas in Hart's murder. In ruling on the admissibility of Thomas's statements, the district court should be mindful of the other requirements of I.R.E. 804(b)(3)--particularly that the statement be against the declarant's penal interest such that a reasonable person in declarant's position would not have made the statement unless declarant believed it to be true.

If, on remand, the district court determines that any of the alternate perpetrator evidence that was excluded from Meister's trial is admissible, the district court should also consider the admissibility of the evidence offered by Meister in his motion for new trial. This new evidence must be considered within the context of all of the other alternate perpetrator evidence offered by Meister. If the district court concludes this new evidence is relevant, within the larger alternate perpetrator context, then the district court must also consider the admissibility of the evidence under the criteria of I.R.E. 403 by balancing its probative value with the countervailing considerations outlined in the rule.

Finally, if the district court determines *any* of the alternate perpetrator evidence is admissible, the district court must weigh the impact of the exclusion of that evidence from Meister's trial. Ultimately, then the district court must decide whether a new trial should be ordered in Meister's case.

D. Motion for a New Trial

Meister asserts the district court abused its discretion in denying his motion for a new trial based on newly discovered evidence, the statements that Thomas allegedly made to L.R.⁶ A decision on a motion for a new trial is reviewed under an abuse of discretion standard. *State v. Egersdorf*, 126 Idaho 684, 687, 889 P.2d 118, 121 (Ct. App. 1995). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). A motion for a new trial based on newly discovered evidence must disclose: (1) that the evidence is newly discovered and was unknown to the defendant at the time of the trial; (2) that the evidence is material, not merely cumulative or impeaching; (3) that it will probably produce an acquittal; and (4) that failure to learn of the evidence was due to no lack of diligence on the part of the defendant. *State v. Drapeau*, 97 Idaho 685, 691, 551 P. 972, 978 (1976).

As noted above, Meister moved for a new trial on the grounds of the newly-discovered evidence that Thomas had threateningly told L.R. that he had killed another woman, and the district court held that the new evidence proffered by Meister was inadmissible hearsay and that it would not produce an acquittal. We have already directed the district court to consider on remand the admissibility of this evidence in conjunction with other alternate perpetrator evidence offered by Meister. However, the district court also held that, even if admissible, this new evidence standing alone probably would not produce an acquittal. We agree. While the statement certainly goes to Thomas's character, it does not directly implicate him in Hart's murder, nor does it clear Meister of involvement. Further, there would be reason for the jury to conclude that Thomas's claim to have killed another woman was not truthful but was merely a

⁶ In his motion for a new trial, Meister also asserted that a new trial was required as a matter of public policy. Meister argued that, while he was found guilty under the state's theory that he was hired by the victim's boyfriend to kill her, a grand jury rejected an indictment against the boyfriend. However, Meister does not raise this issue on appeal.

lie that he used to intimidate L.R. The district court did not err in concluding the new evidence *by itself* was insufficient to warrant a new trial as it probably would not result in an acquittal.

As previously discussed in this opinion, upon remand the admissibility of the evidence presented in Meister's motion for new trial may be considered by the district court. The admissibility of this new evidence should be considered within the context of any other admissible alternate perpetrator evidence reviewed on remand. However, we conclude that, as a separate issue, the district court correctly ruled that the new evidence, considered on its own, even if admissible, probably would not produce an acquittal. Meister has failed to demonstrate that the district court abused its discretion in denying his motion for a new trial that was predicated on this evidence alone.

E. Sentence Review

Meister argues that the district court abused its discretion and violated his privilege against self-incrimination guaranteed by the Fourteenth and Fifth Amendments to the United States Constitution, and the comparable protections of Article I, Section 13 of the Idaho Constitution, in imposing his sentences. Specifically, Meister contends not only that his sentences are excessive, but that the district court improperly punished him for his continued assertion of innocence after trial. If, on remand, the district court grants a new trial, the issues raised by Meister regarding his sentences will be moot. Because a new trial may not be allowed on remand, we will address the sentencing issues now.

The United States Supreme Court has established the Constitutional propriety of extending leniency to those pleading guilty and not extending leniency "to those who have not demonstrated those attributes on which leniency is based." *Corbitt v. New Jersey*, 439 U.S. 212, 224 (1978); *see also State v. Regester*, 106 Idaho 296, 299, 678 P.2d 88, 91 (Ct. App. 1984). As a result, it is well established that Idaho trial courts may consider a defendant's failure to accept responsibility in determining whether rehabilitation efforts would be fruitful when imposing sentence. *See State v. Murphy*, 133 Idaho 489, 494, 988 P.2d 715, 720 (Ct. App. 1999); *State v. Brown*, 131 Idaho 61, 73, 951 P.2d 1288, 1300 (Ct. App. 1998); *State v. Nooner*, 114 Idaho 654, 656, 759 P.2d 945, 947 (Ct. App. 1988). Furthermore, a fixed life sentence, such as Meister's, may be deemed reasonable if, among other reasons, the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society. *See State v. Eubank*, 114 Idaho 635, 638, 759 P.2d 926, 929 (Ct. App. 1988).

However, this Court has also previously established that, because a defendant retains the right to appeal his or her judgment of conviction, a trial court should not coerce the defendant into sacrificing the right to assert innocence by threatening a more severe sentence. *State v. Lawrence*, 112 Idaho 149, 157, 730 P.2d 1069, 1077 (Ct. App. 1986). Our statement in *Lawrence* was supported by persuasive authority from the United States Fifth Circuit Court of Appeal's opinion in *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966).

In *Thomas*, the defendant was charged with bank robbery in criminal violation of the federal code. The defendant pled not guilty and asserted his innocence when testifying at trial. A jury found the defendant guilty as charged. At sentencing, the federal district court stated the following:

“If you [the defendant] come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the Court also must take that into account. Now, which will it be?”

Thomas, 368 F.2d at 944. The defendant again asserted his innocence. The court, again, asked the defendant if he wished to persist in his assertion of innocence, and the defendant responded affirmatively. Subsequently, the federal district court imposed the maximum sentence allowed by law upon the defendant.

Upon reviewing the sentencing proceedings, the Fifth Circuit noted initially that the defendant's guilt had not yet been irrevocably adjudged as the opportunity for appeal and new trial were still available. *Id.* at 945. The court then observed that the district court had created a situation where, if the defendant admitted guilt to avoid the harsher sentence, not only would he forego the aforementioned post-conviction options, but would also confess to the crime of perjury because he had testified as to his innocence at trial. *Id.* In short, the court concluded that the district court's question essentially threatened the defendant with a harsher sentence unless he abandoned not only his right to appeal but also his Fifth Amendment right to refuse to incriminate himself. The court ultimately vacated the sentence and remanded for resentencing. *Id.* at 946.

The majority of Federal Circuit Courts of Appeal which have considered this sentencing matter are generally in accord with *Thomas*. See *United States v. Oliveras*, 905 F.2d 623, 626 (2d Cir. 1990); *United States v. Roe*, 670 F.2d 956, 973 (11th Cir. 1982); *Poteet v. Fauver*, 517

F.2d 393, 396 (3d Cir. 1975); *United States v. Hayward*, 471 F.2d 388, 390 (7th Cir. 1972); *Scott v. United States*, 419 F.2d 264, 268 (D.C. Cir. 1969). However, the Ninth Circuit has previously declined to apply *Thomas*. In *Gollaher v. United States*, 419 F.2d 520 (9th Cir. 1969), the sentencing court rebuked the defendant for failing to admit to the crime he had been convicted of and took this into account when sentencing him. While the court did not expressly disapprove of or distinguish *Thomas*, it was not persuaded by its reasoning. The court concluded that the defendant's Fifth Amendment rights had not been infringed and affirmed the sentence imposed. *Gollaher*, 419 F.2d at 530-31; *see also United States v. Westin*, 448 F.2d 626, 632 (9th Cir. 1971).

Despite *Gollaher*, several state appellate courts within the Ninth Circuit have either adopted or been persuaded by the reasoning in *Thomas*, including this Court. *See State v. Kamana'o*, 82 P.3d 401, 408-09 (Haw. 2003); *Stedtfeld v. State*, 114 Idaho 273, 276, 755 P.2d 1311, 1314 (Ct. App. 1988); *Lawrence*, 112 Idaho at 157, 730 P.2d at 1077; *State v. Imlay*, 813 P.2d 979, 983-84 (Mont. 1991); *Bushnell v. State*, 637 P.2d 529, 531 (Nev. 1981).

While *Thomas* and its progeny establish that it is improper to attempt to coerce a defendant into acknowledging guilt at sentencing through threats of punishment, we note again that a trial court is not completely restricted from using continued assertions of innocence as a factor in sentencing. *See Murphy*, 133 Idaho at 494, 988 P.2d at 720. As noted above, a trial court may consider the failure to take responsibility for crimes committed in considering the defendant's potential for rehabilitation. *Id.* It is also acceptable for a trial court at sentencing to express its disbelief of a defendant's assertions of innocence and use this as a factor at sentencing. *United States v. Grayson*, 438 U.S. 41, 51-52 (1978). In doing so, the trial court does not violate the defendant's Fourteenth Amendment due process rights, nor does it impermissibly chill the defendant's right to testify in defense of oneself. *Id.* at 52.

In examining the foregoing law, we recognize the substantial difference between a trial court expressing disbelief of a defendant's assertion of innocence or considering such assertion a failure to accept responsibility, and coercing a defendant to admit guilt prior to sentencing. On the topic of this distinction, we consider the language of the Supreme Court of Hawaii in *Kamana'o* to be particularly illuminating:

[A] significant number of jurisdictions has recognized the subtle, yet meaningful, distinction between imposing a harsher sentence upon a defendant based on his or her lack of remorse, on the one hand, and punishing a defendant for his or her

refusal to admit guilt, on the other, the latter being a violation, *inter alia*, of a criminal defendant's rights to due process, to remain silent and to appeal.

Kamana'o, 82 P.3d at 407.

After considering the law in Idaho, as well as persuasive authority from other jurisdictions, we now hold that it is a violation of a defendant's due process rights, the right to appeal, and the Fifth Amendment right to not incriminate oneself, when a sentencing court, either expressly or implicitly, threatens a harsher sentence if the defendant refuses to admit guilt prior to the imposition of sentence. In reviewing an allegation of such coercion, we apply a "totality of circumstances" standard and consider any comments by the trial court that allegedly imply coercion within the context of the entire record. *See Brown*, 131 Idaho at 73, 951 P.2d at 1299; *Regester*, 106 Idaho at 300, 678 P.2d at 92.

In the instant case, Meister argues that the district court improperly threatened Meister with a harsher sentence if he did not abandon his claim of innocence and, subsequently, punished Meister at sentencing for his continued assertion of innocence. To support his argument, Meister relies on the following remarks made by the district court at a hearing on the state's motion to revoke bond:

I have to sentence Mr. Meister on the 30th of June. If Mr. Meister were to accept responsibility in the murder of Tonya Hart, I would view the sentencing much differently than I would if he continues to maintain his innocence. I do not believe Mr. Meister to be innocent. And I think that he should know that if he continues to maintain his innocence that I will sentence him differently than I would if he were to accept his responsibility for the shooting death of Tonya Hart.

. . . And I think Mr. Meister has a decision to make prior to the time that I sentence him. And that sentence--and that decision will color the way in which I view this case.

And I'm not trying to be oblique, I'm not trying to hide the ball, I'm trying to be as candid and as forthright as I can and I hope that advanced knowledge puts him in a position to make a more reasoned decision than he would otherwise be in a position to make.

Toward the end of the hearing, the district court further stated:

So, Mr. Meister has a decision to make. He has always had a decision to make. And he has made the decision in a way that will not bode well for him at the time of sentencing if he continues to maintain his innocence because I'm convinced that he's guilty. And I'm not--I'm not trying to be threatening, I'm not trying to cajole, I'm trying to tell you where I am. And he--it's his decision to make, not mine for him.

The district court's comments were made during a revocation of bond hearing which preceded the sentencing. The district court explicitly warned Meister that his continued assertion of innocence would affect the sentences he received. The district court then suggested that, if Meister made "a more reasoned decision," which can only be interpreted as admitting responsibility and effectively abandoning his right to assert his innocence prior to appeal, then the sentence would be different.

At the sentencing hearing, the district court initially commented that it believed Meister's refusal to admit his guilt stemmed from his inability to tell his mother, but did not connect this observation to any lack of rehabilitative potential in Meister. Moreover, after reviewing the goals of sentencing, the district court went on to specifically state:

I cannot make the finding that you so utterly lack rehabilitative potential that imprisonment until death is the only feasible means of protecting society. I, however, can find, and do find, that the offense which you have been convicted of is an exceptionally--is so egregious that it demands an exceptionally severe measure of retribution and deterrence.

The district court's statements at the motion to revoke bond hearing implicitly threatened Meister with a harsher sentence if he continued in asserting his innocence. The district court then followed through with this threat by imposing the maximum permissible sentence for first degree murder (the prosecutor having not requested the death penalty), despite admitting it believed Meister was not "utterly lacking in rehabilitative potential."

After reviewing the totality of the circumstances, we are constrained to hold that the district court violated Meister's due process rights, his right to not self-incriminate, and his right to appeal by threatening him with harsher punishment if he would not confess his guilt and then imposing the maximum sentence when Meister continued to assert his innocence.

This is the dispositive sentencing issue on appeal and, as a result, we need not address Meister's other issues regarding his sentences. Accordingly, we vacate Meister's sentences and remand for resentencing.

III. CONCLUSION

We hold that the district court did not err in admitting evidence of Meister's confession and in excluding evidence related to Meister's co-conspirator. However, the district court committed error in failing to recognize the admissibility of Meister's alternate perpetrator

evidence was an issue of discretion to be guided by the Idaho Rules of Evidence. Additionally, we hold that the corroboration requirement found in I.R.E. 804(b)(3) is satisfied if the district court determines that the evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. We also conclude that the district court did not abuse its discretion in denying Meister's motion for a new trial. Finally, under the totality of the circumstances, we conclude that, by threatening Meister with a harsher sentence if he continued to assert his innocence, the district court violated his rights. Accordingly, we remand for further proceedings and vacate Meister's sentences. Upon remand, the district court is to consider the admissibility of Meister's alternate perpetrator evidence and, if a new trial is not ordered by the district court, resentence Meister. Finally, we affirm the district court's order denying Meister's motion for a new trial.

Judge LANSING and Judge GUTIERREZ, **CONCUR.**